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SUPREME COURT, U.S.
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IN THE

Supreme Court of the United States

October Term, 1959

No. 330

BERNARDO BALANCIO,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, Bernardo Balancio, respectfully prays that a Writ of Certiorari issue to review the final judgment of the United States Court of Appeals for the Second Circuit, affirming the judgment of the United States District Court for the Southern District of New York, entered in favor of defendant-appellee in an action under the Federal Tort Claims Act.

The Opinions of the Courts Below

The Opinion of the District Court was filed on December 1, 1958 and appears at page 1a. The Opinion of the Court of Appeals was filed on May 22, 1959 and appears at page 40a, as well as in the Appendix.

Jurisdiction

The statutory jurisdiction of the Supreme Court to review by writ of certiorari the judgment here complained of is conferred by Title 28, United States Code, Section 1254.

Question Presented

Is a federal employee who is injured anew by a separate and independent tort of malpractice of a government hospital, while being treated for an injury received in the course of his employment, entitled to the protection and benefits conferred by the Federal Tort Claims Act?

Summary Statement of the Matter Involved

This is a malpractice claim by a patient against a hospital under the Federal Tort Claims Act, 28 U. S. C. 1346.

The claimant was a federal employee and the hospital a government hospital.

The facts are that Bernardo Balancio, a civil service seaman was injured in the line of his duty and shortly thereafter hospitalized.

It is not disputed that for the injuries suffered "while in the performance of his duty," he was entitled solely to compensation benefits under the Federal Employees Compensation Act, 5 U. S. C. 751 *et seq.*; *Johansen* v. *United States*, 343 U. S. 504, *Patterson* v. *United States*, 36 L. Ed. 2d 971, 79 S. Ct. —— (1959).

The controversy herein is whether the Federal Tort Claims Act applies to a federal employee who is a patient

in a federal hospital and has the independent tort of malpractice committed upon him.

Contrary to the opinion below which deems this claim to be based upon aggravation, plaintiff contends in allegation SIXTH of his Amended Complaint,

> "... That as a result of defendant's independent tort of rendering improper and inadequate medical care and attention at the aforesaid hospital facility-s, plaintiff was CAUSED, without any fault on his part contributing thereto, by said negligent and careless acts of the defendant by its agents, servants and/or employees to become permanently disabled ..."

so that Mr. Balancio is and will be confined to bed and/or home for the remainder of his life.

Plaintiff now comes before this Honorable Court and presents for the first time on behalf of all federal employees as well as himself, the issue whether he is entitled to the protection and relief under the Federal Tort Claims Act, for the malpractice and negligence of a government hospital.

Reasons Relied Upon for Allowance of the Writ

The question here presented is one of fundamental importance in the federal law governing the hospital-patient relationship and more particularly, the relationship between a government hospital and a federal employee.

Upon information and belief, this question has never been presented for decision to this Court, although it be of national importance to all federal employees.

Divergence of Opinion Between Circuits

There is a divergence of opinion between the Circuits in so far as decisions are concerned with this problem.

In the case of *Reid* v. *United States of America*, 224 F. 2d 102, 251 F. 2d 691, the Fifth Circuit held that a federal employee has a cause of action under the Federal Tort Claims Act against a federal hospital.

The government in that case raised the defense that the Federal Employees Compensation Act was the sole and exclusive remedy available to a federal employee but the Fifth Circuit made short shrift thereof. Therefore, this is in direct conflict with the Second Circuit's decision in the case at Bar wherein the Court below held to the contrary, i.e. Federal Tort Claims Act does not apply to a federal employee.

In the case of *Canon* v. *United States of America*, 188 F. 2d 444 and 217 F. 2d 70, the Ninth Circuit held that a federal employee injured "in the course of her treatment" in a federal hospital and eligible for compensation, nevertheless has a valid cause of action under the Federal Tort Claims Act, against a government hospital.

The Court reasoned that Canon could not have elected the Federal Employees Compensation Act because the tort of malpractice occurring while a patient in a hospital did not occur until after acceptance of hospitalization.

Therefore, there is not only a clear cut cleavage of opinion between the Second Circuit on one hand and the Fifth Circuit, but also between the Ninth Circuit and the Second Circuit.

As Judge Hulen said in the case of *Hewson* v. *United States*, 88 F. Supp. 148, the " . . . Federal Tort Claims Act

has been held applicable to suits by Federal employees . . . ," citing *Brooks* v. *United States of America*, 337 U. S. 43. There would seem to be some conflict between the Second Circuit's ruling herein, and the Supreme Court's decision in the case of *Brooks* v. *United States*, *supra*, as well as *Brown* v. *United States*, 348 U. S. 110, wherein this Honorable Court held the Federal Tort Claims Act,

> ". . . provides that the United States shall be liable in the same manner . . . and to the same extent as a private individual . . . 28 U. S. C. 2674 . . . certainly this claim is one which might be cognizable under local law if the defendant were a private party . . ."

CONCLUSION

In the present state of the law, the lower Court rulings have an urgent need for a clarifying decision by this Court.

For the foregoing reasons, it is respectfully requested that this petition for a writ of certiorari be granted.

Respectfully submitted,

MORRIS HIRSCHHORN,
Counsel for Petitioner

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 277—October Term, 1958.

(Argued April 24, 1959 Decided May 22, 1959.)

Docket No. 25516

BERNARDO BALANCIO,

Appellant,

—v.—

UNITED STATES OF AMERICA,

Appellee.

Before:

HAND and LUMBARD, *Circuit Judges,*
and ANDERSON, *District Judge.*

On appeal from a judgment of the District Court for the Southern District of New York, Noonan, *J.* presiding, dismissing the plaintiff's amended complaint for failure to state a claim under the Tort Claims Act, §1346(b), Title 28, U. S. Code.

MORRIS HIRSCHHORN, *for appellant.*

LEAVENWORTH COLBY, *for appellee.*

HAND, *Circuit Judge*:

The plaintiff appeals from a judgment of Judge Noonan, dismissing his amended complaint under Rule 12(b)(6) for failure to state a claim upon which relief could be

granted under the Tort Claims Act, §1346(b) of Title 28, U. S. Code. The amended complaint alleged that the plaintiff, as a civilian seaman employed by the United States, was admitted into a public health service hospital owned and operated by the United States in Seattle; that while there the hospital employees negligently rendered improper medical care and attention to him while he was suffering from severe head and skull injuries; and that as a result he had become gravely and permanently disabled. In his original complaint he had alleged the same facts, but had added that he had been "severely" injured during the course of his employment on a ship operated by the defendant; and it is common ground that he had been so injured in the face and head while at work as a civilian seaman. Moreover, it is not disputed that for the injuries suffered on the ship "while in the performance of his duty" he was entitled to compensation under Section 1 of the Federal Employees' Compensation Act, 5 U. S. C. §751, Section 7(b) of which (5 U. S. C. §757(b)) provides that "the liability of the United States or any of its instrumentalities" under that section "with respect to the injury or death of an employee shall be exclusive, and in place, of all other liability of the United States," specifically including "any Federal tort liability statute." The action is based upon the theory that the plaintiff was entitled to recover under the Tort Claims Act for the aggravation of his injuries on shipboard because the negligence or malpractice in the hospital created a claim for relief, separate or independent of the original injuries; and that, although

his only remedy for the original injuries was exclusive by virtue of §7(b) of the Compensation Act; his presence in the hospital was not any part of "the performance of his duty."

In *Johansen* v. *United States*, 343 U. S. 427 (1952), the Supreme Court, although by a margin of only one vote,

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held that Section 7(b) of the Compensation Act applied to civilian seamen employed upon a United States ship. It is well settled law that a person, physically injured by the negligence of another, may recover in one action against a tortfeasor, not only for any injuries caused by the tortfeasor's negligence, but for any aggravation of them due to the incompetence of the physicians who treated him. *Restatement of Torts*, Section 457. This has been held in a number of cases in state courts.* We have found no decision in an appellate court under the Federal Employees' Compensation Act that is on all fours with the case at bar, although in *Ellamar Mining Co.* v. *Possus*, 247 Fed. Rep. 420, the Court of Appeals for the Ninth Circuit did interpret the Alaska Compensation Act to allow recovery under an Alaska statute similar to the Federal Tort Claims Act for the aggravation of injuries compensable under the local act. That was more than forty years ago, long before *Johansen* v. *United States*, *supra* (343 U. S. 427) was decided, and when Compensation Acts were new and not so favorably regarded as they now are: e.g., *O'Leary* v. *Brown-Pacific-Maxon, Inc.*, 340 U. S. 504. In *Reid* v. *United States*, 224 Fed. (2) 102 (C. A. 5), the court thought that the plaintiff had been refused compensation because he had not

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* *Nall* v. *Alabama Utilities Co.*, 224 Ala. 33, 138 So. 411 (1931); *Ash* v. *Mortensen*, 24 Cal. 2d 654, 150 P. 2d 876 (1944); *Persten* v. *Chesney*, 212 S. W. 2d 469, 475 (Mo. 1948); *Sauter* v. *New York Central & H. R. R. R.*, 66 N. Y. 50 (1876); *Thompson* v. *Fox*, 326 Pa. 209, 192 Atl. 107 (1937); *Selleck* v. *City of Janesville*, 100 Wisc. 157, 75 N. W. 975 (1898).

originally been injured in the course of his employment; and on the second appeal 251 Fed. (2) 691 this ruling was not disturbed; at any rate the point was not taken that compensation was the exclusive remedy. In *Canon* v. *United States*, 188 Fed. (2) 444 and 217 Fed. (2) 70 (C. A. 9), the first decision depended in part upon a supposed option to elect between compensation and the Tort Claims Act; and

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Johansen v. *United States*, *supra* (343 U. S. 504), had not yet decided that the Compensation Act was the exclusive remedy and that there was no option, at least as to civilian seamen. In *United States* v. *Morin*, 299 Fed. (2) 824 (C. A. 9) the point was not mentioned at all: apparently the defense was not raised. *Volk* v. *New York*, 287 N. Y. 279, is to the contrary of what we are now deciding, but it is not authoritative, and with deference it does not persuade us.

It is not necessary, we think, to hold that it was part of the plaintiff's duty to go to the hospital, because the aggravation of his initial injuries, suffered while he was indubitably in performance of his duty, should be regarded as resulting from the initial injuries themselves. As we have just said, that is the rule at common-law when the claim is for negligence; the initial wrong is the cause of all that follows, even when there has interveped a succeeding negligent act that produced the aggravation. We interpret the Compensation Act as a substitute for the whole of the claim that, but for it, would have arisen under the Tort Claims Act. Of course it may be true that the compensation granted by the Compensation Act, is not an adequate substitute for the unlimited recovery open to Federal employees, as well as others, under the Tort Claims Act. That is to say, it is possible that to accord to all Federal employees a limited remedy for injuries, even though they are caused without "fault," is not the equivalent of a grant of unlimited remedies under the Tort Claims

Act to those who can show that their injuries are caused by "fault." However, that is certainly not for us to say. Be it as it may, we cannot disregard the fact that Congress meant that, whenever "compensation" was available to a Federal employee, it was to be his only remedy.

Judgment affirmed.

Judgment

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-second day of May one thousand nine hundred and fifty-nine.

Present:

HON. LEARNED HAND,
HON. J. EDWARD LUMBARD,
Circuit Judges.
HON. ROBERT P. ANDERSON,
District Judge.

BERNARDO BALANCIO,
Plaintiff-Appellant.

—v.—

UNITED STATES OF AMERICA,
Defendant-Appellee.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO,
Clerk.

In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 330

BERNARDO BALANCIO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

1. The Government respectfully calls the attention of the Court to the following facts, which show that the petition was filed out of time:

On May 22, 1959, the Court of Appeals for the Second Circuit entered judgment, affirming the district court's dismissal of petitioner's complaint under the Federal Tort Claims Act, 28 U.S.C. 1346(b). The petition for a writ of certiorari was not received for filing in this Court until August 21, 1959, or 91 days after the entry of judgment by the Court of Appeals (Pet. 12). No extension of time was ob-

tained. The petition, therefore, should be denied or dismissed for failure to file within the time specified by 28 U.S.C. 2101(c).

2. If the Court feels that the petition should not be denied or dismissed on the ground that it was not timely filed and that it should be considered on the merits, the Government requests that it be given an opportunity to file a further brief in response to the petition.

Respectfully submitted,

J. LEE RANKIN,
Solicitor General.

SEPTEMBER 1959

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UNITED STATES OF AMERICA.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY MEMORANDUM IN SUPPORT OF WRIT OF CERTIORARI

MORRIS HIRSCHHORN
Attorney for Petitioner
111 Broadway
New York 6, N. Y.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

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UNITED STATES OF AMERICA.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY MEMORANDUM IN SUPPORT OF WRIT OF CERTIORARI

1. Defendant invokes 28 U. S. C. 2101(c) in an attempt to have this petition dismissed summarily, on the grounds that the petition was one day late.

The aforesaid statute reads as follows:

> "Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety (90) days after the entry of such judgment or decree. A Justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty (60) days."

A reading of the aforesaid statute reveals by its language that an appeal need not be filed in ninety (90) days, but rather an appeal " . . . shall be *taken* or applied for within ninety (90) days after the entry of such judgment or decree . . . ". (Italics ours.)

The appeal herein is from a judgment entered on May 22, 1959 and the record on appeal for petition was served by registered mail on the defendant on August 20, 1959. Since the day of judgment is excluded from counting the ninety (90) day period, 137 U. S. 577, it can be seen that there are 9 days left in May, 30 days in June, 31 days in July and 20 days in August for a total of 90 days.

2. By depositing the petition and record on appeal with defendant-appellee's agent, the United States Post Office, on the ninetieth day and registry receipt being issued therefor photostat of receipt attached hereto), defendant through its authorized agency took possession and had custody of the record on appeal and hence the appeal was timely taken.

3. The defendant, by its local counsel in New York, Mr. Berman of the Admiralty Division, United States Attorney's Office, Federal Courthouse, Foley Square, New York City, was fully apprised and advised of plaintiff-appellant's intention to petition this Court for a writ of certiorari. Mr. Berman helped this deponent with the procedure to be used in this appeal and further recommended what substantive arguments appellant should advance to this Honorable Court as suggested by Chief Counsel, Leavenworth Colby of the United States Department of Justice, Admiralty Division in Washington, D. C.

4. There is legal authority by this Honorable Court that when a party desiring to appeal signifies his intention to do so in any appropriate mode within the time allowed by the statute, the time limitation ceases to affect the case. *U. S.* v. *Adams*, 6 Wall. 101, 18 Law Ed. 732.

WHEREFORE, it is respectfully requested that plaintiff-appellant's petition for a writ of certiorari be granted.

Respectfully submitted,

MORRIS HIRSCHHORN
Attorney for Plaintiff-Appellant
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New York 6, N. Y.